

Office of Chief Counsel  
Internal Revenue Service  
**Memorandum**

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to:

(Small Business/Self-Employed)

from: Donna M. Crisalli  
Senior Technician Reviewer, Branch 2  
(Income Tax & Accounting)

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subject: Section 162(h)

This chief counsel advice responds to your request for assistance dated October 5, 2006. This advice may not be used or cited as precedent.

**LEGEND**

State X        =  
Year 1        =  
Year 2        =

**ISSUES**

(1) Is a legislature "in session" for purposes of § 162(h)(2)(A) of the Internal Revenue Code on days on which the legislature is convened but is not sitting in an organized capacity for the transaction of legislative business or capable of transacting legislative business?

(2) Does the term "legislative day" under § 162(h)(2) include a day that falls between two days on which the legislature is in session?

## CONCLUSIONS

(1) A legislature is “in session” on days on which the legislature is sitting in an organized capacity for the transaction of legislative business and is capable of transacting legislative business.

(2) A day that falls between two days on which the legislature is in session is a legislative day for an individual only when (i) the two legislative days are separated by four or fewer days on which the legislature is not in session, or (ii) the physical presence of the individual is formally recorded at a meeting of a committee of the legislature.

## FACTS

According to the legislative calendar of the state legislature of State X (the legislature), during Year 1 the legislature convened on January 5 and recessed on June 23. During this time, the legislature was scheduled to transact legislative business on certain Mondays, Tuesdays, Wednesdays, and Thursdays. The number of these days per week varied from one day to four days. For example, in January the legislature was scheduled to transact legislative business on January 5, 10, 11, 18, 19, 24, 25, and 31. We assume that the legislature was in fact “in session” for purposes of § 162(h) on these days.

In addition to the days indicated on the legislative calendar, the legislature was convened for various reasons on certain other days during the period from June 24 of Year 1 through January 4 of Year 2. For example, the legislature might be convened to avoid the expiration of pending legislation or to prevent the governor from making interim judicial appointments. Only one legislator was required to be present for the legislature to be convened for these purposes and other legislators were not expected to be in attendance to transact legislative business on these days. Therefore, a quorum generally was not present to transact legislative business, as required by State X’s constitution.

## LAW AND ANALYSIS

Section 162(a)(1) provides that a taxpayer generally is allowed a deduction for ordinary and necessary business expenses, including unreimbursed traveling expenses while away from home.

Section 162(h)(1) provides that an individual who is a state legislator and who makes an election under § 162(h) is deemed to be away from home in the pursuit of a trade or business on each “legislative day.” Furthermore, the individual is deemed to have expended on such a day the greater of the unreimbursed amount generally allowable for the day (i) to employees of the legislator’s state for per diem while away from home, to the extent the amount does not exceed 110 percent of the amount described in (ii); or (ii) to employees of the executive branch of the federal government for per diem while traveling away from home in the United States. Section 162(h) does not apply with

respect to any legislator whose place of residence within the legislative district represented is 50 or fewer miles from the state capitol building.

Section 162(h)(2) defines a “legislative day” as any day on which (A) the legislature was in session (including any day in which the legislature was not in session for a period of 4 consecutive days or less), or (B) the legislature was not in session but the physical presence of an individual legislator was formally recorded at a meeting of a committee of the legislature.

An individual who makes the election under § 162(h) is deemed to be away from home in the pursuit of a trade or business on each legislative day, therefore whether the legislator is in fact away from home on the legislative day is not relevant.

Neither § 162(h) nor the legislative history define the term “in session.” However, in Okanogan Tribe of Washington v. United States, 279 U.S. 655 (1929) (Pocket Veto Case), the Supreme Court interpreted the term “House” in the United States Constitution to mean the House of Representatives “in session,” that is, “sitting in an organized capacity for the transaction of business...the constitutional quorum, assembled for the transaction of business, and capable of transacting business....” Id. at 683.

For purposes of § 162(h), a legislature is “in session” only when it is sitting in an organized capacity for the transaction of legislative business and is capable of transacting legislative business. Thus, a legislature is in session on a day when members ordinarily would be expected to be present at the legislature, for example, on a day on which bills are debated or voted upon. A legislature is not in session merely because it is convened “pro forma,” such as in a session comprised of no more than a call to order, an opening prayer, and the reading of pending bills by a clerk. If a quorum is necessary to conduct legislative business, the legislature is not in session if no quorum is present.

#### Issue (1)

Accordingly, the legislature in State X was not in session for purposes of § 162(h) on days on which no quorum was present and no legislative business could be transacted. These days are not legislative days with respect to an individual legislator unless the legislature is not in session for a period of four consecutive days or less or the physical presence of that individual was formally recorded at a meeting of a committee of the legislature under § 162(h)(2)(B).

#### Issue (2)

Under § 162(h)(2)(A), the term “legislative day” includes any day on which the legislature is not in session for a period of four consecutive days or less. Days that fall between two days on which the legislature is in session are legislative days if the period

between the two days in session does not exceed four consecutive days. Only days that the legislature is “in session” for purposes of § 162(h) are taken into account in applying § 162(h)(2)(A). Under this rule, in addition to the days described on the State X legislative calendar, the following days are legislative days for the legislators of State X during the month of January in Year 1: January 6, 7, 8, 9, 20, 21, 22, and 23. All other dates in January are not legislative days with respect to an individual legislator unless the legislature was in session or the physical presence of the legislator was formally recorded at a meeting of a committee of the legislature.

Please call \_\_\_\_\_ at \_\_\_\_\_ if you have any further questions.